STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1118

State of Minnesota,
Respondent,

vs.

Timothy Richard Hershberger,
Appellant.

Filed August 9, 2012
Affirmed
Willis, Judge[*]

Rice County District Court
File No. 66-CR-10-3345

Lori Swanson, Attorney General, St. Paul, Minnesota; and

G. Paul Beaumaster, Rice County Attorney, Benjamin Bejar, Assistant County Attorney, Faribault, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy George Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Willis, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

On appeal from a conviction of felony stalking with intent to injure, in violation of Minn. Stat. § 609.749, subds. 2(1), 4(b) (2010), appellant argues that (1) the alleged "unlawful act" was a terroristic threat, and the evidence was insufficient to prove that he made a terroristic threat; (2) the district court erred in allowing a police officer to testify about a statement by a witness who the court found was incompetent to testify; (3) appellant was denied his right to a fair trial when the state played an audio recording of a police interview of the victim; and (4) the court erred in sentencing. We affirm.

FACTS

In September 2010, appellant Timothy Richard Hershberger pleaded guilty to two counts of gross-misdemeanor malicious punishment of a child. The convictions resulted from acts committed against three children: eight-year-old MJS; and her younger brothers, six-year-old SK and four-year-old MLK. The offenses occurred in September 2009 while Hershberger was acting as the children's caretaker. A condition of Hershberger's release pending sentencing was that he have no contact with the victims or any children under age 16.

In the morning on November 8, 2010, while Hershberger was awaiting sentencing on the malicious-punishment convictions, the children's father saw Hershberger walk very slowly by the father's house. The father called the police, but the responding officer was unable to find Hershberger in the area. That afternoon, Hershberger returned to the father's house and walked up to MJS, who was in the yard with MLK and a friend. MJS

testified at trial that Hershberger whispered to her, "saying we have to pay for what we did to him." MJS felt that Hershberger was threatening her and was worried for her life. MJS testified at trial that, based on her past experience with Hershberger, she was afraid that Hershberger intended to murder her or take her away from her parents. MJS told Hershberger that they had not done anything. As Hershberger began to respond, his girlfriend pulled him back, and the two of them walked away.

A few minutes after Hershberger left, MJS told her father about the incident, and he called the police. Faribault Police Officer Joshua Alexander responded to the call. When Officer Alexander arrived at the house, MLK seemed "very, very agitated." Officer Alexander described MJS as "nervous and upset," and he took a statement from MJS at the scene. When Officer Alexander first approached MJS, she began crying, so he had her sit in the front seat of the squad car because it was more private. MJS described the incident to Officer Alexander and told him what Hershberger had whispered in her ear. When Officer Alexander asked why MJS had not immediately told her father about the incident, MJS said that she was afraid that her father would go to jail. The father had previously assaulted Hershberger after learning that Hershberger had abused his children while acting as their caretaker, and the father was taken to jail as a result.

Hershberger was charged with one count each of terroristic threats, in violation of Minn. Stat. § 609.713, subd. 1 (2010); felony stalking with intent to injure, in violation of Minn. Stat. § 609.749, subds. 2(1), 4(b) (2010); and stalking – return to property without

consent, in violation of Minn. Stat. § 609.749, subds. 2(3), 4(b) (2010). The case was tried to a jury.

MJS testified at trial that, when Hershberger earlier had served as caretaker for her and her brothers, he sat and yelled at them, which made MJS very mad and upset. MJS testified that Hershberger shoved her into the corner and put her arms behind her back. He also pushed the children under a pull-out couch, where the cushions went, which hurt and made it hard for the children to breathe. When MJS told Hershberger that it was hard to breathe there, he responded, "Who really cares?" MJS testified that Hershberger "put hot sauce on [her] brother's private part" and had "done things even worse that really hurt me." She testified that Hershberger's conduct made her frightened of him.

The jury found Hershberger guilty on all counts arising from his November 2010 actions. The district court found that the convictions arose from a single behavioral incident and sentenced Hershberger to a stayed term of 23 months on the stalking-with-intent-to-injure conviction, based on a criminal-history score of one because of his status of being on release pending sentencing at the time of the offense. The district court ordered the sentence to run consecutively to a previously imposed one-year gross-misdemeanor sentence for his conviction on the malicious-punishment charges.

D E C I S I O N

I. The evidence was sufficient to support Hershberger's terroristic-threats conviction.

In assessing the sufficiency of the evidence, an appellate court conducts a painstaking review of the record to determine whether the evidence and reasonable

inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach the verdict that it did. *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010). And we assume that the jury rejected any evidence inconsistent with the verdict. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). "We will not disturb a verdict if the jury could reasonably conclude, given the presumption of innocence and the requirement of proof beyond a reasonable doubt, that the defendant was guilty of the charged offense." *Id.* Assessing witness credibility and the weight to be given to witnesses' testimony is exclusively the province of the jury. *Id.*

Hershberger argues that his statement to MJS was insufficient to support his terroristic-threats conviction. "Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror" is guilty of terroristic threats. Minn. Stat. § 609.713, subd. 1 (2010). A threat is "a declaration of an intention to injure another or his property by some unlawful act." *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). We determine whether words are threatening or harmless by examining the context in which they are used. *Id.* Specifically, whether a statement is a threat turns on "whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Id.* (quotation omitted). The defendant's intent is "a subjective state of mind usually established only by reasonable inference from surrounding circumstances." *Id.* at 401, 237 N.W.2d at 614.

"To convict a defendant on a charge of felony terroristic threats, a jury must find that the defendant threatened a specific predicate crime of violence, as listed in Minn.

Stat. § 609.1095." *State v. Jorgenson*, 758 N.W.2d 316, 325 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009). One of the statutory predicate offenses is first-degree assault. A person who assaults another and inflicts great bodily harm is guilty of first-degree assault. Minn. Stat. § 609.221, subd. 1 (2010). "'Great bodily harm' means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2010).

"[T]hreats are context specific." *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009). The communication involved in a terroristic-threats conviction must be viewed in context to determine whether it would "have a reasonable tendency to create apprehension that its originator will act according to its tenor." *State v. Murphy*, 545 N.W.2d 909, 915(Minn. 1996) (quotation omitted); *see also State v. Franks*, 765 N.W.2d 68, 75 (Minn. 2009) (noting, in evaluating a pattern of harassing conduct, that letters had be viewed in light of history of domestic abuse).

Hershberger argues that the past relationship between him and MJS and her brothers was insufficient to turn his statement into a threat to commit first-degree assault because the acts that he committed against them constituted only malicious punishment. But MJS and MLK were upset and frightened by Hershberger's presence at their residence, and MJS testified about specific acts of physical assault that Hershberger had earlier committed against her and her brothers. Given the relationship history and MJS's age of eight, it was reasonable for her to interpret Hershberger's statement as a threat to

commit great bodily harm, and Hershberger acted, if not with the purpose of causing such terror, at least in reckless disregard of doing so.

Hershberger also challenges the sufficiency of the evidence to support his stalking-with-intent-to-injure conviction. A person commits stalking with intent to injure by "directly or indirectly . . . manifest[ing] a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act." Minn. Stat. § 609.749, subd. 2(1). Hershberger argues that, if his statement to MJS was "not an 'unlawful act' constituting terroristic threats, then the evidence" was insufficient to support his stalking-with-intent-to-injure conviction. Because the evidence was sufficient to support Hershberger's terroristic-threats conviction, this argument fails.

II. The district court did not err by admitting MLK's out-of-court statement into evidence when MLK did not testify at trial.

Appellant argues that the admission of MLK's statement to Officer Alexander violated appellant's right to confront the witnesses against him and was prejudicial error. "This court reviews de novo the issue of whether hearsay statements violate the Confrontation Clause." *State v. Ahmed*, 708 N.W.2d 574, 580 (Minn. App. 2006).

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees that every criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, the Supreme Court interpreted this clause to bar the admission of "testimonial statements" made by a declarant out of court, unless the declarant is unavailable to testify at trial and the defendant has had a prior opportunity for cross-

examination. 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). "[T]he critical determinative factor in assessing whether a statement is testimonial is whether it was prepared for litigation." *State v. Caulfield*, 722 N.W.2d 301, 309 (Minn. 2006).

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74 (2006).

Officer Alexander testified that, when he arrived on the scene, he asked MLK who had been there, and MLK "very boldly and confidently yelled out [Hershberger's] name" and stated that "this was the second time that [Hershberger] was by today." Officer Alexander also testified that he asked MLK what he did when he saw Hershberger the second time, and MLK said that he "got scared and ran to the neighbor's house." MLK's statement was made soon after Officer Alexander arrived at the father's house. Considering the circumstances under which the statement was made, we conclude that it was made as an immediate response to the emergency created for the frightened children and was not testimonial.

Even if admission of the statement through Officer Alexander was error, Confrontation Clause violations are subject to harmless-error analysis. *State v. Swaney*, 787 N.W.2d 541, 555 (Minn. 2010). An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error. *Id.* This requires a review of the

entire record and a balancing of the manner in which the evidence was presented, whether the evidence was highly persuasive, whether the evidence was used in closing arguments, whether the defense successfully countered it, and whether there was other evidence of defendant's guilt. *Id.*

Hershberger argues that admitting MLK's hearsay statement was prejudicial error because it corroborated the father's testimony that Hershberger returned to the father's house, and it corroborated MJS's testimony that Hershberger was present and approached the children. But the father's and MJS's testimony established that Hershberger was at the house twice that day, and Hershberger's girlfriend admitted that they had been at the house "at least two" times that day. MLK's statement did not indicate that Hershberger approached the children. Any error in admitting the statement was not prejudicial.

III. The district court did not commit plain error in admitting into evidence an audio recording of a police interview of MJS, in which MJS stated that appellant had previously molested her and her brothers.

Hershberger argues that the district court erred by admitting MJS's recorded statement, which included the comment that Hershberger had "molested" her and her brothers. Although Hershberger objected to the admission of MJS's statement to police, the objection was to the entire statement on the ground that it was cumulative evidence, not to the specific comment that he objects to on appeal.

Because Hershberger did not make a specific objection to the comment to which he objects on appeal, plain-error analysis applies. *See State v. Brown*, 792 N.W.2d 815, 820 (Minn. 2011) (stating that, if a party fails to state specific ground for objection and specific ground is not apparent from context, plain-error analysis applies). "The plain

error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If that three-pronged test is met, this court will correct the error only if it seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

Plain error affects a defendant's substantial rights if it was prejudicial and had a significant effect on the jury's verdict. *State v. Barnslater*, 786 N.W.2d 646, 653 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). We will look "at the entire record to determine if there is a significant likelihood that the jury misused the evidence." *State v. Meldrum*, 724 N.W.2d 15, 21-22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007).

Hershberger does not challenge the district court's admission of MJS's testimony about the past relationship between Hershberger and her and her brothers but rather argues that the term "molest" has "strong connotations of a sexual offense." Although the term "molest" in isolation may have a sexual connotation, it was the choice of a word by an eight-year-old girl and must be taken in context. MJS testified at trial about the specific acts committed by Hershberger, including the fact that he placed hot sauce on MLK's "private part." Given MJS's testimony about the specific acts, which provided a context for the term "molest," we conclude that admission of the comment was not error. Even if admission of the comment was error, it was not plain, and there is not a significant likelihood that the jury misused the isolated reference to Hershberger molesting her and her brothers.

IV. The district court did not err in sentencing Hershberger.

Hershberger also argues that the duration of his consecutive sentence for felony stalking-with-intent-to-injure conviction should have been calculated using a criminal-history score of zero. "A reviewing court will not reverse a district court's determination of a defendant's criminal-history score absent an abuse of discretion. But interpretation of the sentencing guidelines is a question of law reviewed de novo." *State v. Rivers*, 787 N.W.2d 206, 212 (Minn. App. 2010) (citation omitted), *review denied* (Minn. Oct. 19, 2010).

Because Hershberger was on release pending sentencing when he committed the felony-stalking offense, the district court properly assigned him a custody-status criminal-history point under Minn. Sent. Guidelines II.B.2.a (2010). Hershberger argues that the criminal-history point should not have been used in calculating the duration of his felony-stalking sentence because it was a permissive consecutive sentence. *See* Minn. Sent. Guidelines II.F.2 (2010) ("For each offense sentenced consecutive to another offense(s), other than those that are presumptive a zero criminal history score, or the mandatory minimum for the offense, whichever is greater, shall be used in determining the presumptive duration."). The supreme court recently rejected this argument, interpreting the term "another offense" in Minn. Sent. Guidelines II.F.2 to mean a "felony offense" and held that the district court properly used the offender's criminal-history score of three in calculating the duration of a permissive consecutive felony sentence that was imposed consecutive to a gross-misdemeanor sentence. *State v. Campbell*, 814 N.W.2d 1, 6 (Minn. 2012). Under *Campbell*, the district court here did not err by using a

criminal-history score of one when sentencing Hershberger on the felony-stalking offense.

Affirmed.